Federal Court of Appeal  Cour d'appel fédérale

Date: 20170719

Docket: A-341-16

Citation: 2017 FCA 158

[ENGLISH TRANSLATION]

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
GLEASON J.A.

BETWEEN:

6075240 CANADA INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard at Ottawa, Ontario, on May 31, 2017.

Judgment delivered at Ottawa, Ontario on July 19, 2017.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: GAUTHIER J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] The appellant, 6075240 Canada Inc. (607' Canada), did not file tax returns for the 2009 or 2010 fiscal years by the deadlines provided for in the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Suppl.), (the Act). The Minister of National Revenue (Minister) issued an arbitrary assessment for each of these years pursuant to subsection 152(7) of the Act. According to the assessment issued on November 8, 2010, for the 2009 fiscal year, 607' Canada owes $13,078. The

assessment issued on April 10, 2012, for the 2010 fiscal year sets 607' Canada's tax debt for this year at $35,691.

[2] On June 27, 2013, 607' Canada filed its tax return for the 2009 fiscal year, and on September 2, 2015, it filed its return for the 2010 fiscal year. In both cases, the return was filed more than three years after the date when the notice of assessment was sent for the corresponding fiscal year. 607' Canada is asking the Minister to examine its tax returns and issue an assessment based on them. 607' Canada argues that the arbitrary assessment issued by the Minister does not release it from his duty to file its income tax return, nor does it free the Minister from his duty to examine its tax return. The Minister refuses, arguing that he cannot issue a reassessment outside the normal reassessment period provided for in subsection 152(4) of the Act, which is three years after the sending of a notice of an original assessment: see paragraph 152(3.1)(*b*) of the Act.

[3] In response to the Minister's refusal to examine its tax returns, 607' Canada filed an application for judicial review. The Minister responded with a motion to strike the application for judicial review on the grounds that it discloses no reasonable cause of action. 607' Canada's lawyer inadvertently failed to oppose this motion; hence, the prothonotary hearing the case had to examine it without the benefit of arguments and granted the motion, essentially on grounds presented by the Minister.

[4] The prothonotary's decision was appealed from to a Federal Court judge, who allowed the appeal in part. In response to 607' Canada's main argument, according to which the Minister was required to examine its tax returns and issue an assessment based on them, the judge ruled

that this would force the Minister to violate the Act by issuing a reassessment outside the reassessment period. However, the judge refused to strike out 607' Canada's alternative argument that it was led astray when it attempted to file its 2009 tax return electronically. Had it been accepted, the e-filed return would have allowed a reassessment to be issued within the deadline. The Minister, through his agent, the Canada Revenue Agency (the CRA), rejected the attempt to file, advising 607' Canada that its tax return for the year in question had already been filed. The reason for this message was that the CRA considers the arbitrary assessment it issues when a taxpayer does not file a return to be the taxpayer's return for the purposes of the Act. The judge ordered that the paragraphs of the application for judicial review pertaining to the assessment issued for the 2010 fiscal year be struck out, but that the allegations related to e-filing the 2009 tax return be pursued.

[5] 607' Canada appealed from the Federal Court decision. It submitted that the judge erroneously examined a substantive issue in a motion to strike. According to 607' Canada, the judge should have simply determined whether the application for judicial review disclosed a cause of action, even if it were doubtful. If it did, he should have allowed the application for judicial review to proceed. The Minister argues that the judge was right and that the relief sought by 607' Canada cannot be granted outside the reassessment period set out in subsection 152(4) of the Act.

[6] Since this is an appeal from a decision by a Federal Court judge sitting on appeal from a decision by a prothonotary, the standard of review, according to this Court's decision in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2016] FCJ

No 943 (QL) at paragraphs 66–73, is that established in *Housen v. Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33 (*Housen*), which is the standard of correctness for questions of law and the standard of palpable and overriding error for questions of fact or questions of mixed fact and law.

[7] Applying the wrong legal principle is an error of law: *Housen* at paragraph 27.

[8] A judge hearing a motion to strike is not to decide the question raised in the proceedings. The role of the judge is to decide whether it is plain and obvious that the case is doomed to failure. If there is a possibility that the applicant will be successful, he must not be deprived of his chance to defend his case. Neither the complexity of the issues raised, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case: *Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959, [1990] SCJ No 93, at paragraph 33.

[9] This Court made the same pronouncement in *Apotex Inc. v. Laboratoires Servier*, 2007 FCA 350, at paragraph 34 (*Laboratoires Servier*):

> At paragraph 39 of its written submissions, Apotex submits, rightly in my view, that "if the responding party has put a conflicting interpretation 'worth considering', it is not plain and obvious that the claim will not succeed". Although it is clear the Motion Judge correctly understood the "plain and obvious" test enunciated in Hunt, supra, she did not answer the question of whether or not Apotex's proposed interpretation was "worth considering" or whether it had any chance of success. Rather, she reached her own conclusion on the disputed point of statutory interpretation. That, in my view, constitutes an error on her part.

[10] In *Laboratoires Servier* as in this case, the issue is one of statutory construction. Upon reviewing the question, this Court denied the motion to strike because it was not possible to say that Apotex's construction of the law was dubious or entirely untenable. Consequently, this Court could not conclude that it was plain and obvious that Apotex would be unsuccessful.

[11] In this case, the Federal Court did not ask whether it would be appropriate to examine the construction of the Act defended by 607' Canada Inc. or whether that construction might be accepted. It simply decided the question as it would have if it were hearing the application for judicial review; hence, it made the error that our Court noted in *Apotex*. This error in law calls for our intervention.

[12] The starting point of the analysis is the legal principle that the Federal Courts have no jurisdiction over assessments issued by the Minister. The remedy available to taxpayers who feel wronged by an assessment issued by the Minister is to appeal to the Tax Court of Canada: *Ministre du Revenu national (appelant) (intimé) v. A.W.C. Parsons, Hugh J. Flemming fils, pour leur propre compte et à titre d'exécuteurs testamentaires de la succession de Hugh John Flemming père (intimés) (requérants)*, [1984] 2 CF 331, *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 FCR 557, at paragraph 93. If 607' Canada is asking the Federal Courts to vacate the assessments issued by the Minister, it is doomed to failure.

[13] But that is not what 607' Canada is seeking. It argues that it is not asking this Court to vacate the arbitrary assessments, but only to order the Minister to examine its tax returns. He

could then set 607' Canada's income and tax owing and, if applicable, issue a reassessment in the light of these returns and any verifications he will have made.

[14] According to 607' Canada, the arbitrary assessments cannot release it from the requirement to file its income tax returns (subsection 150(1) of the Act), nor can they release the Minister from the requirement, under subsection 152(1) of the Act, to examine the income tax return when it is filed and to determine the tax owing. It argues that the Minister's error consists in upholding the arbitrary assessment he issued as if it were the income tax return filed by the taxpayer. 607' Canada acknowledges that subsection 154(7) of the Act authorizes the Minister to issue an arbitrary assessment, but this assessment, which is largely a collection action, cannot preclude the taxpayer's and Minister's mutual requirements to file and to examine, respectively, income tax returns.

[15] 607' Canada cites *Abakhan & Associates Inc. v. Canada (Attorney General)*, 2007 FC 1327, [2007] FCJ No 1709 (QL), where the Federal Court acknowledged that it could intervene after the Minister had refused to issue a reassessment at the request of the trustee in bankruptcy for a taxpayer that overstated its income to conceal the precarious state of its finances. The trustee asked that a reassessment be issued so that the excess tax paid by the bankrupt could be made available to creditors. While acknowledging that it could not vacate an assessment, the Federal Court ruled that it could intervene with respect to the Minister's refusal to issue a reassessment.

[16] 607’ Canada replies to the Minister’s argument that he cannot issue a reassessment outside the reassessment period by focusing on the very language of subsection 152(4), which provides that this applies only to taxpayers who have filed an income tax return:

(4) The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer’s normal reassessment period in respect of the year only if …	(4) Le Ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l’impôt pour une année d’imposition, ainsi que les intérêts ou les pénalités, qui sont payables par un contribuable en vertu de la présente partie ou donner avis par écrit qu’aucun impôt n’est payable pour l’année à toute personne qui a produit une déclaration de revenu pour une année d’imposition. Pareille cotisation ne peut être établie après l’expiration de la période normale de nouvelle cotisation applicable au contribuable pour l’année que dans les cas suivants : …
(Emphasis added)	(Soulignement ajouté)

[17] In any case, 607’ Canada argues that Parliament restricted the authority to issue a reassessment under subsection 152(4) to protect taxpayers, so they can count on there being some finality in the organization of their affairs, except in the situations covered by subparagraph 152(4)(*a*)(i). It would be a distortion of that provision to construe it as a barrier to the Minister’s authority to examine income tax returns that a taxpayer has filed late, especially since the Minister can trigger the limitation period by issuing an arbitrary assessment without notifying the taxpayer.

[18] Has 607’ Canada raised a question that merits consideration? It seems to me that a construction of the Act, that holds that an arbitrary assessment under subsection 152(7) does not release either the taxpayer or the Minister from their respective duties under subsections 150(1)

and 152(1), calls for an examination. The wording of these two subsections is clear: a tax return "shall be filed with the Minister" (subsection 150(1)) and "the Minister shall . . . examine a taxpayer's return of income" (subsection 152(1)).

[19] The Minister's argument that the limitation period provided for in subsection 152(4) prevents him from issuing a reassessment to 607' Canada based on its tax returns does not justify the summary dismissal of the application for judicial review, since, as the Supreme Court stated in *Hunt v. Carey Canada Inc.*, at paragraph 33, the possibility of a strong defence does not justify the summary dismissal of a case.

[20] In accordance with the doctrine propounded in *Apotex*, I am therefore of the opinion that the application for judicial review should be pursued. Since 607' Canada wants to have its income tax returns for tax years 2009 and 2010 examined—this must be specified, since the decision 607' Canada is applying to have reviewed refers only to 2009—I will set aside the orders issued by the prothonotary and the Federal Court judge and dismiss the motion to strike. Since 607' Canada did not file anything in the hearing before the prothonotary, it does not have the right to costs for this hearing. It has the right to costs before the Federal Court and this Court.

"J.D. Denis Pelletier"

J.A.

“I agree.
Johanne Gauthier J.A.”

“I agree.
Mary J.L. Gleason J.A.”

Translation certified true

François Brunet, revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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